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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK ANTRON CARTWRIGHT,

Defendant and Appellant.

F057485

(Super. Ct. No. BF125987A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, R. Todd Marshall and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Gomes, J. and Poochigian, J.

STATEMENT OF THE CASE

On January 15, 2009, the Kern County District Attorney filed an information in superior court charging appellant Derrick Antron Cartwright as follows: counts 1 and 2--robbery, a serious felony (Pen. Code, §§ 212.5, subd. (c), 1192.7, subd. (c)(19))¹ with personal use of a firearm (§ 12022.53, subd. (b)) and a prior prison term (§ 667.5, subd. (b)); count 3--assault with a firearm (§§ 245, subd. (a)(2)), 1192.7, subd. (c)(8)) with personal use of firearm (§ 12022.5, subd. (a)) and a prior prison term (§ 667.5, subd. (b)); and counts 4 and 5--possession of a firearm by an ex-felon (§ 12021, subd. (a)(1)) with a prior prison term (§ 667.5, subd. (b)).

Appellant was arraigned, pleaded not guilty to the substantive counts, denied the special allegations, and demanded a jury trial. The court subsequently bifurcated trial of the prior prison term allegations. On March 12, 2009, the jury returned verdicts finding appellant guilty of the substantive counts and finding the related firearm allegations to be true. On the same date, the court, sitting without a jury, found all of the prior prison term allegations to be true.

On April 10, 2009, the court conducted a sentencing hearing, denied appellant probation, and sentenced him to a total term of 20 years 4 months in state prison. The court imposed a five-year upper term on count 1 with a 10-year term for the related firearm allegation and a one-year term for the prior prison term allegation. The court imposed a consecutive one-year term (one-third of the middle term) on count 2 with a term of three years four months for the related firearm allegation. The court imposed a concurrent upper term of four years on count 3 but struck a term of 10 years on the related firearm allegation (§ 12022.5).² The court imposed three-year upper terms on

¹ Unless otherwise noted, all statutory references are to the Penal Code.

² Although the court struck the section 12022.5 enhancement as to count 3, the abstract of judgment erroneously reflects the enhancement as a concurrent term. The trial court is directed to amend the abstract of judgment by deleting the stricken enhancement

counts 4 and 5 and stayed those terms (§ 654). The court imposed a \$200 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (§ 1202.45), and awarded 149 days of custody credits.

On the same day as sentencing, appellant filed a timely notice of appeal, challenging the imposition of a four-year concurrent term on count 3. We affirm.

STATEMENT OF FACTS³

The following facts are taken verbatim from the probation officer's report filed April 10, 2009:

"Counts One, Three, and Four

"On April 25, 2008, at approximately 8:29 p.m., deputies were dispatched to the JD Market regarding a robbery that occurred.

"Upon arrival, contact was made with Jasveer Kaur, the victim. She appeared to be crying and was holding the back of her head. A deputy interviewed the victim and she stated that a male subject, later identified as Derrick Antron Cartwright, the defendant, entered the convenience store wearing a mask over his face. The defendant approached the victim as she was seated behind the counter in a chair. He ordered her to open the cash register and pointed a silver firearm at her. The victim indicated she became scared, opened the register, and gave the defendant approximately \$100 to \$150 in United States currency.

"Following this, the defendant reached behind the victim and took a stack of 'The Big Cheese' California lottery tickets. After retrieving the lottery tickets, the defendant struck the victim in the head with the firearm prior to fleeing in an unknown direction. The victim stated she recognized the man's voice and stature as being a frequent customer who lives in the area.

and to transmit certified copies of the amended abstract to all appropriate parties and entities.

³ Because appellant raises only a sentencing issue on appeal, we will include a general recitation of facts taken verbatim from the report and recommendation of the probation officer. In the discussion below, we will set forth from the reporter's transcript the salient facts underlying the contention on appeal.

“Personnel from the Kern County Fire Department arrived and offered to treat the victim; however, she declined medical aid.

“On November 21, 2008, detectives interviewed the victim. She positively identified the defendant as the subject who robbed her at gun point on April 25, 2008.

“Counts Two and Five

“On June 12, 2008, at approximately 5:38 p.m., deputies were dispatched to the JD Market regarding a robbery in progress.

“Upon arrival, contact was made with Jasveer Kaur, the victim. She reported that earlier in the evening, at approximately 5:30 p.m., she was assisting a customer. A male subject, later identified as Derrick Antron Cartwright, the defendant, then entered the store with a silver colored handgun. The victim stated the defendant pointed the gun at her and said, ‘Open, Open, Open.’ The victim opened the cash register and stepped away. The defendant approached the register and removed an amount of currency. While the defendant was doing so, the victim jumped over the counter and ran to a safe area. Following this, the defendant fled from the store.

“On November 21, 2008, detectives interviewed the victim. She positively identified the defendant as the subject who robbed her at gun point on April 25, 2008.

“On December 2, 2008, the defendant was booked for related charges.”

Defense Testimony

Appellant testified he purchased the lottery tickets in two separate transactions with an acquaintance named Tim. He described Tim as “[s]ix-one, brown skinned, bald head, medium build.” Appellant denied robbing and striking Kaur in the JD Market.

DISCUSSION

DID THE TRIAL COURT ERRONEOUSLY IMPOSE A FOUR-YEAR CONCURRENT TERM ON THE ASSAULT CHARGED IN COUNT III?

Appellant contends the trial court imposed an unauthorized concurrent sentence on count 3 because the force used in the robbery charged in count 1 was the same force

underlying the assault charged in count 3. He maintains the sentence on count 3 should have been stayed under section 654.

Allegations of the Information

The information alleged in relevant part:

“Count: 001, on or about April 25, 2008, Derrick Antron Cartwright, did willfully and unlawfully take personal property in the possession of Jasveer Kaur, from his or her person or immediate presence and against his or her will, by means of force or fear, within the meaning of Penal Code section 212.5(c), a felony. . . . [¶] . . . [¶]

“Count: 003, on or about April 25, 2008, Derrick Antron Cartwright, did willfully and unlawfully commit an assault on Jasveer Kaur, with a firearm, to wit: a handgun, in violation of Penal Code section 245 (a)(2), a felony. . . .”

Recommendation of the Probation Officer

The probation officer recommended a consecutive term on count 3, stating:

“As to Count Three, it is felt consecutive sentencing is also justified. While the assault occurred on the same occasion as the robbery in Count One it appears to be a separate act of violence and had a different criminal intent. The defendant had already accomplished the fruits of his robbery and was in possession of the stolen money and lottery tickets when he chose to assault the victim. The assault was not necessary or incidental to committing the robbery; therefore, consecutive sentencing is justified.”

The Sentencing of Appellant

At the April 10, 2009 sentencing hearing, the trial court stated:

“I did consider with regard to the probation officer’s recommendation that Count 3 be consecutive. I did consider that recommendation. And considering all the circumstances of this case, taking into account all of the objectives that the Court must consider at the time of sentencing -- and, obviously, punishment is one factor. Protection of the community is another factor. Consistency of sentences.

“And in considering the evidence that related to the assault, that resulted in the Count 3 conviction. . . . [¶] . . . [¶]

“And so I am going to find that, basically, it resulted in minor injuries to the victim in that case. . . . [¶] . . . [¶] So my tentative is that that is a sufficient period of time of incarceration to accomplish all the goals of sentencing. And my tentative is to run Count 3 concurrent to Count 1.”

The court ultimately sentenced appellant on count 3 in the following manner:

“As to Count 3, probation is denied. Defendant is sentenced to the Department of Corrections for the upper term of four years. Said sentence to be served concurrent to the sentence imposed above, for a total fixed term of 20 years four months.”

Facts Elicited at Trial

Jasveer Kaur testified that she worked as a cashier at the JD Market at Sterling and Niles Streets in Kern County. Kaur was on duty at the store during the 8:00 p.m. hour on April 25, 2008. Appellant, a regular customer, entered the store dressed in a black t-shirt covered with paint stains at the bottom, shorts, and soft white-and-blue shoes. Appellant purchased a beer, looked around the store, and then departed. Appellant returned 10 to 15 minutes later armed with the gun.

On the second visit to the store, appellant was wearing a black shirt but it appeared longer. He was also wearing a brown, hooded sweatshirt on top and was hiding his face with some sort of ready-made mask. The mask completely covered the face with the exception of the eyes. Kaur said appellant came straight to the counter and showed Kaur a small, silver-colored gun. Appellant pointed the gun at Kaur and with the other hand pointed toward the cash in the register. She opened the register, moved backwards, and stood in place. At that point, appellant was located on Kaur’s left side.

Appellant picked up money from the register, looked at the shelves below the register, and then approached Kaur. She moved backwards and turned around. Appellant took an unidentified object and hit the left-hand side of the rear of Kaur’s head.

Appellant then picked up some cash and lottery scratchers.⁴ Kaur ran outside and appellant followed her out of the store. He walked or ran to the next street. Kaur was in tears and feeling a lot of pain in her head. She called her boss, who arrived at the store and summoned police. Kaur's boss took her home and she was still upset and crying. Kaur spoke to an officer that evening, explained what happened, and gave the officer a description of the assailant. Detective Kavin Brewer interviewed Kaur in November 2008 and showed her a photographic lineup. Kaur identified a photograph of appellant as that of the robber.

Applicable Law

Before determining whether to impose concurrent or consecutive sentences on all counts on which a defendant was convicted, the court must determine whether the proscription in Penal Code section 654 requires a stay of imposition of sentence on some of the counts. (Cal. Rules of Court, rule 4.424.) Section 654, subdivision (a) provides, in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Concurrent sentences can violate section 654, subdivision (a). (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.) Under the plain language of the statute, multiple punishment may not be imposed for a single "act or omission." (§ 654, subd. (a).) In addition, however, section 654 prohibits multiple punishment for multiple acts which comprise an "indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

A course of conduct is "indivisible" if the defendant acts with "a single intent and objective." (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.) "If, on the other hand,

⁴ Kaur said appellant purchased one or two \$3.00 lottery tickets from the JD Market each day.

defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Separate objectives may be found when “the objectives were either (1) consecutive even if similar or (2) different even if simultaneous.” (*People v. Britt* (2004) 32 Cal.4th 944, 952.)

Section 654 bars multiple punishment for conduct that violates more than one statute but constitutes an indivisible course of conduct. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) “The divisibility of a course of conduct depends upon the intent and objective of the defendant.” (*Ibid.*) If all the offenses are incidental to one objective, the defendant may be punished by any, but only one, offense. On the other hand, if the defendant entertained multiple, independent objectives, the trial court may punish each violation notwithstanding shared common acts or otherwise indivisible conduct. (*Ibid.*) “[T]he fact certain acts are proximate in time is not determinate [*sic*] in finding an indivisible course of conduct. Multiple criminal objectives may divide those acts occurring closely together in time. [Citation.]” (*People v. Chacon* (1995) 37 Cal.App.4th 52, 67.)

An appellate court reviews section 654, subdivision (a) multiple sentencing issues for substantial evidence. (*People v. Garcia, supra*, 167 Cal.App.4th at p. 1564.) “The question of whether the defendant held multiple criminal objectives is one of fact for the trial court, and, if supported by any substantial evidence, its finding will be upheld on appeal.” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) The trial court “is vested with broad latitude in making its determination. [Citations.]” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) The court’s findings may be either express or implied from the court’s ruling. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.) Our review of those findings is made “in the light most favorable to the respondent and

[we] presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143.)

Analysis

Appellant contends the robbery in count 1 consisted of taking both the money in the cash register and the lottery tickets. He goes on to argue:

“The taking of the money from the cash register occurred before Kaur was assaulted, and the taking of the lottery tickets happened after the assault. Counts one and three shared the common objective of taking property from the victim, Kaur. The force used to commit the robbery of the money and lottery tickets was the same force used to assault Kaur. The assault was part of one indivisible course of conduct to further the robbery. Under these circumstances, appellant cannot be punished twice for the same indivisible transaction. The sentence on count three should have been stayed.”

Respondent maintains appellant “essentially completed his initially planned robbery by having Kaur open the register and appellant taking the money.” Respondent submits it was not necessary for appellant to strike Kaur to take the lottery scratchers. Respondent therefore concludes appellant’s intent and objective in striking Kaur was separate from his intent and objective in robbing Kaur. The parties cite a number of cases to illustrate the difference between separate and distinct acts and an indivisible course of conduct.⁵ However, California courts have held each case involving section

⁵ *People v. Brown* (1989) 212 Cal.App.3d 1409, disapproved on another point in *People v. Hayes* (1990) 52 Cal.3d 577 [Defendants forcibly entered a two-bedroom Los Angeles apartment, fired shots at the occupants, and struck them down. Defendants were convicted of robbery, attempted robbery, and multiple counts of assault with a firearm. District Five of the Court of Appeal, Second District, held the force used by the defendants in committing the robbery consisted of a course of conduct that included forcible entry into the apartment and assaults on two of the occupants. One of the charged assaults was clearly in the course of the robbery and was not a separate and distinct act. Therefore, the trial court could not properly impose a concurrent term for the assault.];

People v. Salazar (1987) 194 Cal.App.3d 634 [After a purse-snatching incident involving a single victim, defendant pleaded guilty to assault with force likely to produce

654 must be determined on its own circumstances. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

The crime of robbery (§ 212.5, subd. (c)), as charged in count 1, and the crime of assault with a firearm (§ 245, subd. (a)(2)) charged in count 3 entail two separate and

great bodily injury and robbery and admitted a prior felony conviction. The trial court sentenced defendant to the middle term on the felony assault but failed to impose any terms for the robbery and the prior. Division Three of the Court of Appeal, Fourth District, agreed the trial court retained the discretion to impose a lesser term and stay execution of sentence on the greater offense. However, the trial court failed to pronounce sentence on the robbery count and the accompanying enhancement. The court modified the abstract of judgment to reflect imposition of a middle term on the robbery count with a consecutive five-year term for the prior conviction and then stayed those terms under section 654.];

People v. Jenkins (1987) 196 Cal.App.3d 394, disapproved on another point in *People v. Brown* (1993) 6 Cal.3d 322, 336, fn. 12, [Two employees went to the night depository window of a North Hollywood bank. One went to open the depository and the other remained in a vehicle with the money. Defendant approached the employee at the depository, pointed a handgun at his head, and demanded the money. Defendant fired a shot at the employee's head. The shot missed and the employee instructed his fellow employee to throw the money from the car. The second employee complied and defendant picked up the funds and fired another shot at the first employee. Defendant was convicted of robbery and assault with a deadly weapon and sentenced to consecutive terms. Division Four of the Court of Appeal, Second District, affirmed the sentence against defendant's section 654 challenge. Defendant's second shot was unnecessary to the robbery and constituted a gratuitous act of violence.];

People v. Coleman (1989) 48 Cal.3d 112 [Defendant in a capital case was convicted of multiple crimes in a rural Sonoma County home. Citing section 654, he maintained that he could not be sentenced for both assault with intent to murder one victim and the robbery of that same victim. The Supreme Court disagreed and affirmed that portion of the sentence. Prior to the assault, defendant had essentially completed the robbery by compelling the robbery victim to assist and not interfere with his gathering of valuables and preparation for flight. The homicide victim entered the kitchen of the home and defendant killed her with a shotgun. Defendant next ordered the robbery victim to lie down and he stabbed her in the back. The trial court properly concluded that defendant committed the assault with the intent and objective of preventing the victim from sounding the alarm about the murder. This intent and objective were separate from, not incidental to, the robbery.].

distinct intents.⁶ Robbery is a specific intent offense. (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007-1008.) Assault with a deadly weapon is a general intent offense. (*People v. Tran* (1996) 47 Cal.App.4th 253, 261.) More specifically, robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will accomplished by means of force or fear. The intent to steal must be formed either before or during the commission of the act of force. (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The specific intent required for robbery is the intent to permanently deprive. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 417.) In contrast, assault entails the general intent to willfully commit a battery, an act which has the direct, natural and probable consequences, if successfully completed, of causing injury to another. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1734; *People v. Page* (2004) 123 Cal.App.4th 1466, 1472.)

Here, as a matter of law, the crime charged in count 1 entailed an intent separate and distinct from the intent underlying the crime charged in count 3. Further, from the facts outlined above, the trial court could reasonably conclude that appellant robbed Kaur to permanently deprive her of the cash register proceeds and primarily struck Kaur to prevent her from summoning help after he left the store. In other words, the trial court could reasonably determine that appellant's intent in striking the blow was not to permanently deprive her of additional valuables, i.e., the lottery scratchers, but to commit a battery against her person. Moreover, given the chronology articulated by Kaur, the trial court could reasonably infer that appellant committed the act of force against her and then formed the intent to steal the scratcher tickets. Given that construction of the

⁶ In a related vein, a court employs the "elements test" to determine whether, as a matter of law, the statutory definition of a greater offense necessarily includes the lesser offense. Because a robbery can be committed strictly by means of fear, assault is not a lesser included offense of robbery under the elements test. (*People v. Parson* (2008) 44 Cal.4th 332, 349.)

sequence of events, the striking of the blow and the subsequent taking of the scratchers could not be deemed part of the robbery charged in count 1. Although appellant protests to the contrary, we must review under the substantial evidence standard the court's factual finding, implicit or explicit, of whether there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.)

Jasveer Kaur's testimony supplied substantial evidence to support the trial court's implicit finding that appellant engaged in a course of conduct with multiple criminal objectives. The court did not err in imposing a concurrent term of imprisonment on count 3 and modification of the sentence is not required.

DISPOSITION

At sentencing, the trial court struck the section 12022.5 enhancement as to count 3 but nevertheless listed it as a concurrent term on the abstract of judgment. The trial court is now directed to amend the abstract of judgment by deleting the stricken enhancement and to transmit certified copies of the amended abstract to all appropriate parties and entities. In every other respect, the judgment is affirmed.